BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT L. SHOUSE	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,065
GOODYEAR TIRE & RUBBER CO.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the March 7, 2002 Award of Administrative Law Judge Brad E. Avery. Claimant was limited to his functional impairment of 15 percent to the body as a whole for the injuries suffered on December 18, 1998, after the Administrative Law Judge found claimant terminated his employment without providing respondent an opportunity to accommodate his restrictions and holding this was not done in good faith. Therefore, the Administrative Law Judge imputed to claimant the wage claimant had been earning with respondent. The Appeals Board (Board) held oral argument on September 12, 2002.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, John A. Bausch of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. Additionally, at oral argument, the parties agreed that the depositions of Stanley D. Stotts, taken March 4, 2002, and Danette Jackson, taken March 4, 2002, were part of the record, although not received by the Administrative Law Judge until March 19, 2002, twelve days after the March 7, 2002 Award was issued. The Board considered both the Stotts and Jackson depositions in this matter.

ISSUES

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award of the Administrative Law Judge should be modified to award claimant an increased functional impairment followed by a permanent partial general disability under K.S.A. 1998 Supp. 44-510e.

Claimant began working for respondent as a tire builder on March 29, 1993. Claimant first suffered injury to his low back on July 10, 1993, when his supervisor laid some tires behind him and, when claimant turned around, he tripped over them. Claimant injured his low back and also suffered a hernia. Claimant underwent surgical repair of the hernia and returned to work after conservative treatment to his low back.

Claimant experienced several aggravations to his low back including a low back injury on July 31, 1994, a middle back strain in 1996 and a back injury on April 24, 1998. Claimant received conservative treatment for these injuries, including chiropractic care, and continued working for respondent.

On or about December 18, 1998, claimant began experiencing additional problems with his back. The Goodyear plant shut down over the holidays, and claimant thought that his back would improve with the time off work. However, when he returned to work in January 1999, his back continued to hurt and progressively worsened.[1] Claimant informed the area manager and was sent to the company doctor in January 1999. Claimant first saw Deborah T. Mowery, M.D., on March 2, 1999. On April 7, 1999, Dr. Mowery returned claimant to work at light duty, which respondent accommodated. Dr. Mowery also recommended that claimant find a lighter line of work, advising him that he would potentially be a candidate for a spinal fusion in the future if he continued the heavy labor with respondent. Dr. Mowery limited claimant's bending and stooping, and restricted his lifting to 50 pounds push, pull and lift. These restrictions were made permanent on May 13, 1999, the last time claimant saw Dr. Mowery.

On May 13, 1999, claimant terminated his employment with respondent, advising Marcus Anderson, the employment manager at Goodyear, that he was leaving partly due to the recommendations of Dr. Mowery and partly because he was relocating to Oklahoma. He could not afford the payments on his house, his truck and his land, and had been offered an opportunity to purchase his uncle's house in Blackwell, Oklahoma, at a greatly

[1] The parties, however, stipulated to a date of accident of December 18, 1998.

reduced price. Claimant relocated shortly thereafter to Blackwell, where he is currently working part-time jobs as a security guard for the local college, as a bus driver for the college and as a bus driver for the City of Ponca City, Oklahoma. He also works part time occasionally for car dealerships and for a local farmer. The information from claimant's testimony indicates he is earning approximately $200 a week with these combined jobs.

It is undisputed that claimant could not return to his regular job with respondent with his permanent restrictions. It is also undisputed that the light-duty job claimant had been given was no longer available once claimant's restrictions became permanent. Furthermore, under the collective bargaining agreement between respondent and the union, respondent could not offer claimant an accommodated job. Instead, claimant would have to bid on any job with respondent that fit his restrictions. Whether claimant would get that job would depend upon his seniority. The record does not establish that there were, in fact, any jobs available that claimant could perform with respondent and that claimant could successfully bid for with his seniority level. The record shows that claimant only had five years of seniority with respondent. Accordingly, although respondent does not show how many jobs existed at Goodyear that fit claimant's restrictions, it is unlikely that claimant could have successfully bid on a permanent job within his restrictions.

Claimant acknowledges he did not give respondent the opportunity to accommodate his restrictions, as the first time permanent restrictions were available is the date that claimant terminated his employment.

Claimant was referred to Edward J. Prostic, M.D., a board certified orthopedic surgeon, for evaluation on October 17, 2000. Dr. Prostic diagnosed grade II spondylolisthesis at L5-S1, and acknowledged and agreed with the restrictions placed upon claimant by Dr. Mowery. Dr. Prostic also reviewed the medical records of Dr. Craven, who found an additional spondylolisthesis or foraminal stenosis, which Dr. Prostic acknowledged and adopted as appropriate. Claimant's grade II spondylolisthesis at L5-S1 was confirmed by x-ray and MRI.

Claimant was referred to a vocational expert, Bud Langston, for an evaluation. Mr. Langston developed a list of forty-eight tasks that claimant had performed over the 15 years preceding his accident. Dr. Prostic, in reviewing the tasks, found claimant unable to perform 42 percent of those tasks, with Bud Langston (interpreting Dr. Mowery's restrictions) finding claimant unable to perform 35 percent of those tasks.

Dr. Prostic testified that without additional information, he was unable to determine what percentage of claimant's task loss resulted from the December 1998 accident and what percentage was caused by claimant's earlier back injuries and aggravations. Dr. Prostic testified that claimant had suffered a series of injuries or cumulative trauma accidents resulting in the total impairment of 15 percent to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*

(4th ed.). Dr. Prostic testified that with claimant's condition, the 15 percent impairment would be consistent whether he used the AMA *Guides* (4th ed.), the AMA *Guides* (3d ed. rev.) or the new AMA *Guides* (5th ed.).

Dr. Prostic was asked how much of claimant's impairment was related to the December 1998 accident. He speculated that probably no more than 2 percent would relate to that accident, but did not state whether the 2 percent was based upon the AMA *Guides* (4th ed.), nor did he identify what criteria he used to establish that number.

Respondent deposed their employment manager, Marcus Anderson. Mr. Anderson discussed the termination of employment by claimant on May 13, 1999.

Respondent's policy required that a person with permanent restrictions be involved in what was called a "medical bump." When a medical bump is imposed, if there is a job available that falls within that person's restrictions, then Mr. Anderson would search the plant to find out if claimant qualified for that job, if claimant's seniority would allow him to bump the person currently holding that position. As claimant voluntarily terminated his employment on May 13, 1999, this search was not undertaken. Mr. Anderson was, therefore, unaware if there were any jobs in the plant that would both meet claimant's restrictions and which claimant would qualify for by seniority to bump into. Mr. Anderson did state that of the 1,600 hourly associates currently employed at the Topeka plant, claimant had seniority over 438, as they were hired after claimant's March 29, 1993 employment date. Mr. Anderson was unaware how many, if any, of these persons had a job that would qualify within claimant's restrictions.

Respondent uses the Isernhagen job description booklet, which describes the weights and limitations on particular jobs. Mr. Anderson, however, did not utilize this information as, once claimant terminated his employment, the job search became irrelevant as far as he was concerned. It would be relevant to the determination of whether claimant could have been accommodated, but neither party saw fit to present this evidence.

When claimant terminated his employment, he had a conversation with Stanley D. Stotts, currently retired, who at the time of the termination was respondent's manager of employment. At that time, claimant and Mr. Stotts filled out a Transfer & Exit Letter relative to claimant's termination. The form was completed on or before May 14, 1999. On the form, Mr. Stotts had written "quit to move out of state." That information came from claimant, who advised Mr. Stotts that he was moving out of state to get closer to his family in Oklahoma. This was considered a voluntary termination on claimant's part. On the completion of the form, which was marked as Exhibit 4 to Mr. Anderson's deposition and introduced into evidence at the Jackson deposition, at the bottom of the page, it was

written that claimant had quit due to "back problems, get closer to home." Mr. Stotts did not know who wrote that entry on the exhibit.

Respondent also deposed Danette Jackson, the Goodyear employment manager. In May of 1999, Ms. Jackson was the shared resource person responsible for working with the Topeka plant. She had a discussion with claimant in May of 1999 regarding his termination. She also signed Anderson Exhibit 4, the Transfer & Exit Letter, indicating that this was a voluntary termination. The bottom part of the form is titled "Voluntary Resignation." It was filled out and signed by claimant. The form requested information as to why claimant was terminating his employment. Claimant wrote "back problems, get closer to home." Ms. Jackson went on to state that claimant was not fired nor asked to quit. The termination was voluntary.

It was acknowledged by all parties, however, that no offer of accommodated employment was made to claimant by respondent at any time either before or after his May 13, 1999 termination.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

K.S.A. 1998 Supp. 44-510e(a) defines functional impairment as:

> [T]he extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In this instance, there is only one functional impairment rating in the record, that being Dr. Prostic's 15 percent to the body as a whole. Respondent contends that while claimant may have a 15 percent impairment, a substantial portion of that preexisted claimant's December 18, 1998 accident. K.S.A. 1998 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

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[2] See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

The Kansas Court of Appeals, in *Hanson*,[3] was asked to consider K.S.A. 44-501(c) and its effect on preexisting functional impairments. The court held that the burden of proving a preexisting impairment as a deduction from the total impairment belongs to respondent once claimant comes forward with evidence of a current aggravation. In this instance, claimant has shown a 15 percent impairment to the body as a whole, including the aggravations of his preexisting impairment. Respondent then argues that it has satisfied its burden with the testimony of Dr. Prostic that probably no more than 2 percent relates to the accident of December 1998. However, Dr. Prostic also testified that claimant's condition is the result of long-term injuries suffered over a period of time, with the cumulation on December 18, 1998. Dr. Prostic's opinion regarding the 2 percent impairment from the 1998 accident was not expressed in the terms of medical certainty. As the court noted in *Hanson*, it is respondent's burden to prove preexisting impairment under K.S.A. 44-501(c). The Board finds that respondent has failed in its burden. Therefore, claimant is entitled to a 15 percent impairment to the body as a whole on a functional basis as a result of the injuries occurring on December 18, 1998.

K.S.A. 1998 Supp. 44-510e(a) defines permanent partial general disability as:

> [T]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In considering K.S.A. 1998 Supp. 44-510e, the Board must also consider the policy set forth by the Kansas Court of Appeals in *Foulk*.[4] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability, contained in K.S.A. 1998 Supp. 44-510e, by refusing to attempt to perform an accommodated job which the employer had offered and which paid a comparable wage. In this instance, at the time of claimant's termination on May 13, 1999, unlike *Foulk*, no offer of permanent, accommodated employment had been made by respondent. The Board, therefore, finds claimant not in violation of the policy set forth in *Foulk*, as he did not reject any offers made by respondent.

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[3] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* ___ Kan. ___ (2001).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

The Board must also, however, consider the policy set forth by the Kansas Court of Appeals in *Copeland.*[5] The court, in *Copeland*, held that for the purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury. The Board in considering whether claimant's decision to terminate was a good faith determination finds that claimant's decision was, in part, based upon claimant's concerns about future surgery. It is acknowledged claimant had family considerations that also weighed on his mind at the time, but the comments by Dr. Mowery that claimant would be heading for a fusion appeared, at least in part, to influence claimant's determination. The Kansas Court of Appeals, in *Oliver*,[6] held that:

> Neither K.S.A. 1998 Supp. 44-510e(a) nor *Foulk's* policy exception require a claimant to seek post-injury accommodated work from his or her employer in every circumstance. . . . *Foulk* and its progeny are concerned with a claimant who is able to work but refuses to do so. Boeing does not cite any law supporting an absolute duty to seek accommodated work from the employer before looking elsewhere.

The court went on to state:

> Whether a claimant requested accommodated work from an employer is just one factor, viewed along with the rest of the record, in determining whether the claimant in good faith attempted to obtain appropriate work.

The Board notes that while Goodyear discussed the possibility of accommodated work, no offer was ever made to claimant of an accommodated position. When respondent representatives testified, they could not state with any certainty whether any jobs existed in the plant which would both meet claimant's restrictions and for which claimant qualified by seniority. It is, therefore, not established in this record that claimant could have been employed at respondent's plant within the restrictions set forth by Dr. Mowery, respondent's company doctor.

Additionally, claimant's concern and his attempts to avoid possible back surgery including a fusion weighed heavily on his determination. The Board does not find claimant's actions violated the policies set forth in *Foulk* or in *Oliver*. The Board, therefore, finds that claimant is not precluded from a work disability under K.S.A. 1998 Supp. 44-510e.

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[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

K.S.A. 1998 Supp. 44-510e requires that a task opinion be expressed by the physician in determining what, if any, tasks claimant can no longer perform as a result of his injuries. The record contains the opinions of both Dr. Prostic and Bud Langston regarding claimant's task loss. The Board finds the 42 percent opinion of Dr. Prostic is the only task loss expressed "in the opinion of the physician" pursuant to K.S.A. 1998 Supp. 44-510e. Therefore, the Board finds claimant has suffered a 42 percent task loss.

The Board finds claimant has made a good faith effort to find employment in Blackwell, Oklahoma.

The statute, therefore, requires that a comparison be made between claimant's current wages and his average weekly wage with respondent. The parties stipulated to an average weekly wage of $1,084.45 on the date of accident. The evidence in the record from claimant's testimony indicates claimant is making approximately $200 per week, which represents an 82 percent loss of wages. In averaging claimant's task loss with his wage loss, the Board finds claimant entitled to a 62 percent permanent partial general disability for the injuries suffered through December 18, 1998.

The Board, therefore, finds that the Award of the Administrative Law Judge should be modified to reflect the above findings.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated March 7, 2002, should be, and is hereby, modified to award claimant a 15 percent permanent disability based on his functional impairment, followed by a 62 percent permanent partial general disability for the injuries suffered through December 18, 1998. Claimant's permanent partial general disability is awarded effective May 14, 1999, his first day after his termination of employment with respondent.

Claimant is awarded 20.86 weeks permanent partial disability on a functional basis through May 13, 1999, at the rate of $366 per week totaling $7,634.76. Thereafter, claimant is entitled to 236.44 weeks permanent partial general disability at the rate of $366 per week totaling $86,537.04 for a 62 percent permanent partial general disability, for a total award of $94,171.80.

As of October 29, 2002, claimant is entitled to 20.86 weeks permanent partial disability on a functional basis through May 13, 1999, at the rate of $366 per week totaling

$7,634.76, followed by 180.71 weeks permanent partial general disability at the rate of $366 per week totaling $66,139.86, for a total of $73,774.62, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $20,397.18 is to be paid for 55.73 weeks at the rate of $366 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John A. Bausch, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation